BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Statement.

The only issue to be decided by this Court is whether the petitioners had a right under the general equity powers of the Courts to a review of the clear violation of jurisdiction by the National War Labor Board Trucking Commission, the National War Labor Board, and the Economic Stabilization Director, and to secure conformity of the decision to the lawful jurisdiction by order of the Court.

The petitioners contend that the general equity powers are sufficiently broad to permit relief, which should have been granted.

The Court of Appeals for the District of Columbia in its decision held that general equitable principles did not authorize review, and stated:

> "No money, property, or opportunity has been taken or withheld from the appellants, and no one threatens any such act. No one threatens, and no one could maintain, either judicial or administrative proceedings against the appellants upon the authority of the Board's order. In these circumstances there is no occasion for review of the Board's order" (R. 62).
>
> . . . . . .
>
> "The regulations promulgated by the President in Executive Order 9250 forbid the adoption, without the Board's approval, of a new wage scale. But neither Executive Order 9250 nor any other regulation forbids adherence to an old wage scale after the Board has approved a new one. Appellants will not, by declining to adopt the new scale, subject themselves to the penal-

ties which the Inflation Control Act provides for violation of its provisions, or to any other penalties" (R. 63).

The Court also held that—

"The legislative history of the War Labor Disputes Act implies a positive intention that these orders should not be reviewed" (R. 61).

Regulations and Statutes Involved.

The National War Labor Board was created by Executive Order 9017 (7 F.R. 237) January 12, 1942. The jurisdiction of the National War Labor Board was defined by the President in Executive Order 9250 (7 F.R. 7871) October 3, 1942. This latter order was issued at the direction of Congress as provided in the Emergency Price Control Act of 1942, 50 U.S.C. 901; c. 26, 56 Stat. 23, as amended October 2, 1942, by the Inflation Control Act of 1942, 50 U.S.C. 961; c. 578, § 2, 56 Stat. 765, which required the President to issue a general order stabilizing prices, wages and salaries at the level of September 15, 1942, subject to such necessary adjustments to aid in the prosecution of the war or correction of gross inequities as might be determined by him. Executive Order 9328 (8 F.R. 4681), promulgated April 8, 1943, reduced the specific exceptions previously enumerated in Executive Order 9250, *supra*, with respect to general wage increases, such as here, to eliminate the approval of increases above the September 15, 1942, wage level for the purpose of eliminating inequalities.

Argument.

There is a right to relief under the general equity powers of the Court which should have been granted. Executive Order 9250 made mandatory the approval of any increase or decrease in wages by the petitioners subject to the approval of the National War Labor Board. The employees refused to continue to work for their then effective wages and requested a wage change,[1] which request petitioners were obligated to recognize under the effective contract between petitioners and the employees. The petitioners were obliged to submit to the jurisdiction of the National War Labor Board. The petitioners' only alternative was to have ceased doing business.[2] If they had made a wage change without approval of the National War Labor Board, none of the wages paid without such approval could have been credited as business expense for income tax purposes. They would also be subject to prosecution under Section 11 of the Emergency Price Control Act of 1942, 50 U.S.C. 901; c. 26, 56 Stat. 23, as amended October 2, 1942, by the Inflation Control Act of 1942, 50 U.S.C. 961; c. 578, § 2, 56 Stat. 765.

It is not correct to state that "No money, property, or opportunity has been taken or withheld from the appellants" (R. 62) and that "neither Executive Order 9250 nor any other regulation forbids adherence to an old wage scale after the Board has approved a new one . . ." (R. 63), because the petitioners could not adhere to the old wage scale and decline to adopt the new scale and continue in business because the employees insisted upon a wage change. A re-

[1] The only provisions of the contract which could be reopened were the wage provisions, which were in dispute.

[2] It is not clear that even such a course would have been available to them in view of their legal obligations as certificated common carriers engaged in interstate commerce. Certainly they could not have ceased business without jeopardizing their operating rights under their certificates because of cessation of operations.

fusal to meet the new scale by ceasing the conduct of business would not subject petitioners to the penalties of the Inflation Control Act, but establishment of a scale without submission to the National War Labor Board clearly would.

The right to do business is a property right. The exercise of the right is subject to reasonable regulation. Here the effect of regulation and statute is to take money and property rights from the petitioners in a manner contrary to the jurisdiction conferred by Executive Order and statute. It is obvious that a vast control is exercised over the entire economy, and the money and property rights of business, under existing circumstances where the increase or decrease of practically all wages throughout the entire country is subject to approval of the National War Labor Board.

In *Utah Fuel Co. et al.* v. *National Bituminous Commission*, 306 U.S. 56, 60, the Court said:

> "Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity. The jurisdiction of a District Court is to be 'determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not.' "

In *Waite et al.* v. *Macy et al.*, 246 U.S. 606, the Court said:

> "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a

usurpation by calling it a decision on purity, quality or fitness for consumption. . . . The Secretary and the board must keep within the statute, *Merritt* v. *Welsh*, 104 U. S. 694, which goes to their jurisdiction . . ."

Again, in *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, it was stated:

"The courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld."

It was stated by the Court of Appeals in this case:

"Judicial review of administrative action cannot be confined by a formula, and existing categories may be extended if need arises . . ." (R. 62).

It is submitted that the petitioners' right to relief falls within existing categories. It is clear that the nature and substance of the violation of regulation and statute, the excess of jurisdiction and the direct and inevitable impact upon the petitioners is of precisely the same kind as was presented in the cited cases wherein the court extended relief. There is no difference which can be recognized at law between the loss caused by threatened divulgence of cost information in the Utah case, the burden of removing tea from the country in the Waite case, the trade loss from the non-reception of mail in the McAnnulty case, and the loss

to the petitioners through paying large sums in wages at an illegally high level.

In the first case, the complaining party was ultimately faced with enforcement of a subpoena by court order; in the second by condemnation and loss of merchandise if there was persistent noncompliance; in the third by undefined loss of business orders (compliance was involuntary); and in the instant case by cessation of business if petitioners did not submit to respondents for decision, or loss of expense credits for tax purposes, and prosecution if they made wage changes through independent action, assuming that such opportunity was theirs.

In considering the problem in the light of cases where the penalty to the party aggrieved cannot be applied until after an order is made, it must be realized that under the existing mechanism of statute and Executive Order the petitioners' plight is even more difficult because they are under pressures for compliance both before and after decision.

The issues in this case cannot be deemed settled by any inferences to be drawn from Congressional debates, 89 Cong. Rec. 3898, 5754-5, 5791, 5794-5, relating to the War Labor Disputes Act, 78th Congress, 1st Session, Ch. 144, Pub. Law 89. The illegal order was adopted by the respondents long before the passage of that legislation on June 25, 1943, and the War Labor Board was created by Executive Order on January 12, 1942. The material amendment to the Emergency Price Control Act was passed October 2, 1942, and the Executive Orders relating to the standards of decision were adopted October 3, 1942, and April 8, 1943, respectively, all antedating both the Congressional discussion and the passage of further legislation. This later legislation in no way limited, repealed or superseded rights, powers or duties previously established. It is obvious that Congressional discussions with respect to the content of that legislation were in no sense related

to decisions and orders made and established prior to the passage of the War Labor Disputes Act.

If it be suggested that the point is disposed of on too narrow a ground, it may be said that it is true that the National War Labor Board could not enforce its own orders by specific penalty without delegation of authority to it by Congress, and it is clear that no such power was given to the National War Labor Board by the terms of the War Labor Disputes Act, *supra*. It is not true, however, that the right to equitable relief depends upon reference to a statute, for the general equity powers are broader than mere statutory enactment and exist independently thereof. If Congress had undertaken to cut off the right to relief under the general equity powers, it would have been obliged to have specifically done so.

This court has recognized that the general equity powers are broader than the rights to review flowing from statutory enactment, when in considering statutory limitations upon the right to review action of the Federal Communications Commission, in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 429, 430, in which Frankfurter, J., in a dissenting opinion, said:

> "Congress did not leave opportunity for reviewing damaging action by the Federal Communications Commission to the general equity powers of the district courts. *It circumscribed the power of the courts in relation to the Commission in the most detailed way.*" (Italics supplied.)

Congress could not repeal the power of the court to review cases by discussion directed to the problem of whether or not it should specially provide for judicial review in a statute which it later adopted containing no reference thereto.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia should be granted.

J. NINIAN BEALL,
Attorney for Petitioners.

RALPH H. CAHOUET,
Of Counsel.

Investment Bldg.
Washington, D. C.